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No. 79-1725

In the Supreme Court of the United States

October Term, 1979

CITY OF BOCA RATON,
Petitioner,

vs.

BOCA VILLAS CORPORATION, and SAMUEL FLETCHER, Trustee, and KEATING-MEREDITH PROPERTIES, INC., and ARVIDA CORPORATION,
Respondents.

RESPONSE OF ARVIDA CORPORATION TO PETITION FOR WRIT OF CERTIORARI

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Respondents.

RESPONSE OF ARVIDA CORPORATION TO PETITION FOR WRIT OF CERTIORARI

Arvida Corporation, Respondent, prays that the petition of the City of Boca Raton for a writ of certiorari be denied, for the reasons set forth in this brief.[1]

1. The following abbreviations will be used:
"A....." . . . . . for the appendix to the petition filed by the City.
"RA....." . . . . . for the appendix to this brief of Respondent, Arvida Corporation.
All emphasis in this brief is supplied by counsel.

OPINIONS BELOW

The findings of fact and conclusions of law entered by the trial court in the *Boca Villas* case are reported. *Boca Villas Corp., et al. v. Pence, et al.*, 45 Fla. Supp. 65 (11th Cir. 1976). The denial of certiorari by the Florida Supreme Court is now reported. *City of Boca Raton v. Arvida Corp.*, 381 So.2d 765 (Fla. 1980); *City of Boca Raton v. Boca Villas Corp.*, 381 So.2d 765 (Fla. 1980).

QUESTIONS PRESENTED

1. Do the decisions below rest on an independent and adequate basis in state law?

2. Do the decisions below present substantial questions of federal law?

CONSTITUTIONAL PROVISIONS INVOLVED

Florida Constitution, Art. VIII, §2(b) (1968):

> POWERS. Municipalities shall have governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services, and may exercise any power for municipal purposes except as otherwise provided by law. Each municipal legislative body shall be elective.

Florida Constitution, Art. I, §9 (1968):

> DUE PROCESS. No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

RESPONDENT'S STATEMENT OF THE CASE

In November 1972, the voters of Boca Raton, Florida, amended their City Charter by the initiative and referendum process to provide that no more than 40,000 dwelling units could ever be built in the City. The City's existing comprehensive plan and zoning ordinances would have permitted a total of 63,000 units, including some 45,000 yet-unbuilt units on vacant properties and 18,000 units already in existence. The City Council therefore was "compelled," in the trial court's words, to implement the "cap" by enacting across-the-board density reductions, averaging 50 percent in the various residential zoning classifications. (A.27). In this manner, approximately one-half of the future dwellings were eliminated.

The City Council had no opportunity to consider the appropriateness of these across-the-board density changes in relation to any particular property. Indeed, the trial court found they might reasonably relate "to the properties or areas involved" only "by pure accident." (A.27).

Beginning in 1957, the City's planning staff and consultants had worked toward, and had achieved, a low-density master plan which included "[s]tringent environmental and aesthetic legislation" (A.21-22), and was termed "second to none." (A.23). This master plan and existing zoning ordinances were unaffected by the "implementing ordinances," except that permissible densities (dwelling units per acre) were reduced in each residential zoning classification.

Arvida Corporation, owner of 2,300 acres of undeveloped residential property, filed suit in the United States District Court immediately after passage of the "cap." Sixteen months later, the District Court abstained from the exercise of its jurisdiction and directed Arvida to file suit

in Florida State Court for the resolution of one issue: whether the dwelling unit "cap" was beyond the power of municipal governments *under the Florida Constitution.* Arvida filed such a suit, expressly reserving all federal issues for determination by the federal court. (A.41-42).

Two other landowners, Boca Villas Corporation and Keating-Meredith Properties, Inc., had filed suit initially in Florida State Court, asserting both state and federal constitutional claims. Their cases were tried soon after Arvida's case was filed, resulting in a consolidated judgment invalidating the cap and certain of the implementing ordinances which affected their properties. The trial court's opinion found there was no rational relationship between the "cap" and any permissible municipal objective, and therefore found violations of "Florida and Federal constitutional guarantees of due process." (A.39). All zoning densities were ordered returned to their pre-"cap" status, and the City was expressly encouraged by the court to try again. *Id.*

As trial approached in Arvida's remaining case under the state constitution, the City and Arvida agreed to adopt by reference all the evidence, findings of fact, and conclusions of law in the earlier case, to be applied in Arvida's case. (A.43). After a one-day presentation of additional evidence, judgment was entered. (A.41). The trial court's opinion specifically noted that Arvida's complaint "reserve[d] federal constitutional issues for determination by the federal court and limit[ed] the cause before this court to municipal power under Section 2 of Article VIII of the Florida Constitution." (A.41-42). The court then summarized its findings and conclusions in the earlier *Boca Villas* case and relied upon them to hold, "the specific limitation of city size to 40,000 dwelling units does not bear a rational relationship to any permissible municipal objective." (A.45).

The City appealed both judgments to the Florida District Court of Appeal, Fourth District. The Florida Court's opinion in *Boca Villas* reviewed what it termed "an exhaustive final judgment holding the charter amendment violated due process provisions of the State *and* Federal constitutions. . ." (A.3). The court, citing no federal case, held, "there is substantial competent evidence to support the finding of an absence of a rational relationship regarding the charter amendment and zoning ordinance." *Id.* The court also interpreted Florida law to hold that such an arbitrary enactment was invalid if it unreasonably impacted upon private property rights, whether or not its effect was economic confiscation. (A.7-11).

In Arvida's case, the only issue presented to the appeals court was whether the record supported the trial court's conclusion that the cap was beyond the scope of municipal power *under the Florida Constitution.* The court held:

> "In the *Boca Villas* case we affirmed the trial judge's decision, holding the charter amendment and implementing ordinances to be arbitrary, because they bore no substantial relation to a permissible municipal purpose. *What we said there is equally applicable here and need not be repeated.*" (A.16).

The City applied to the District Court of Appeal for rehearing in both cases, contending that the court had mistakenly applied a "compelling need" standard to reach its decisions, in conflict with previous reported Florida cases. (RA. 13; 21). The motions were denied without opinion. (RA. 29; 30).

The City then applied to the Florida Supreme Court for a writ of certiorari, again asserting conflict between the "cap" decisions and other reported Florida cases. (RA. 31). On January 30, 1980, that Court denied certiorari without opinion.

REASONS FOR DENYING THE WRIT

I. The Court Is Without Jurisdiction Because the Judgments of the Florida State Courts Rest on Adequate and Independent State Grounds.

This Court, "from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn,* 324 U.S. 117, 125 (1945). In order for jurisdiction to exist, it must appear that decision of the federal issue was necessary to the judgment below. *Lynch v. Pierson,* 293 U.S. 52, 54 (1934). The "obvious" reason for this principle is that the Court's "power is to correct wrong judgments, not to revise opinions." If the same judgment would be rendered by the state court after its views of federal law were corrected, then this Court's review "could amount to nothing more than an advisory opinion." *Herb, supra,* 324 U.S. at 126.

Although the opinion of the State Court of Appeals in *Boca Villas* contained one reference to "the State and Federal Constitutions" (A.3), it is apparent that the court premised its decision upon the Florida Constitution. The opinion relied in large part upon previous Florida cases, *Burritt v. Harris,* 172 So.2d 820 (Fla. 1965) and *Davis v. Sails,* 318 So.2d 214 (Fla. 1st D.C.A. 1975). The opinion cited no particular provision of the United States Constitution, and no decision of any federal court.

In *Jankovich v. Indiana Toll Road Commission,* 379 U.S. 487 (1965), the Indiana Supreme Court invalidated a city's airport zoning ordinance, holding it was "a taking of private property for public use in violation of the provisions of Article I, Section 21 of the Indiana Constitution *and* the 14th Amendment to the Constitution of the United

States." *Id.* at 489-490. On certiorari, this Court noted the Indiana Court "quite understandably did not analyze separately the effect of the two provisions but considered them together." Finding no indication that the Indiana decision was "based less forcefully on the Indiana Constitution than on the 14th Amendment," the Court held, "Under our settled decisions the state ground in this case must be regarded as an independent and adequate ground of decision, and we so hold." *Id.* at 491-492.

In the present case, the sole emphasis in the lower court's opinion is state law. The holding in *Jankovich*, therefore, should apply even more forcefully.

Moreover, because of the unusual procedural history of this case, there is absolutely no doubt that the Florida constitutional ground is both an adequate and an independent basis for decision. Arvida's complaint below raised *only* the state issue, and both the trial court and the appeals court treated this issue as having been decided by their earlier decisions in *Boca Villas*. Thus, even if *Boca Villas* were construed as expressing an opinion about federal law, the Courts below were able to utilize its state law holding as the independent, determinative factor in the *Arvida* case.

Any suggestion by the City that the state and federal issues are "interwoven," or that the case should be remanded to the state court to clarify the basis of its decision, *see Minnesota v. National Tea Co.*, 309 U.S. 551 (1940), should be rejected. The Court uses the remand procedure only when necessary "to protect [its] jurisdiction when . . . given reasonable grounds to believe it exists." *Herb v. Pitcairn, supra,* 324 U.S. at 128. In other words, it must appear from the record that the state court "felt constrained to rule as it did" because of the federal constitution. *National Tea, supra,* at 555.

There is no indication in the opinions of the Florida Court of Appeal that the Court even considered the federal constitution as a basis for decision, much less felt "constrained" to rule a certain way because of it. Therefore, this Court is without jurisdiction.

II. The Record Does Not Present a Substantial Federal Question.

In the absence of a violation of a fundamental right or a suspect classification, this Court has unequivocally announced that it will no longer engage in substantive due process analysis—the balancing of a statute's impact upon private rights against the state interest fostered by the statute. *Whalen v. Roe,* 429 U.S. 589 (1977); *North Dakota v. Snyder's Drug Stores, Inc.,* 414 U.S. 156 (1973); *Ferguson v. Skrupa,* 372 U.S. 726 (1963). Of course, a state court may do so in interpreting its own constitution. The state constitution may impose, for example, a greater protection for private property rights than does the federal constitution, so long as such an interpretation does not directly violate a specific federal constitutional provision. *North Dakota v. Snyder's Drug Stores, supra,* 414 U.S. at 167; *cf., Oregon v. Hass,* 420 U.S. 714, 719 (1975); *Cooper v. California,* 386 U.S. 58, 62 (1967). It is "fundamental that state courts be left free and unfettered . . . in interpreting their state constitutions." *Minnesota v. National Tea Co.,* 309 U.S. 551, 557 (1940).

When a matter is thus foreclosed by prior decisions of this Court, no substantial federal question is presented. *See Palmer Oil Corp. v. Amerada Petroleum Corp.,* 343 U.S. 390 (1952); *Equitable Life Assurance Society v. Brown,* 187 U.S. 308 (1902). Under *Whalen, Snyder's Drug Stores,* and *Ferguson, supra,* the City must urge the violation of a specific federal right in order to present a case of sufficient importance to warrant this Court's attention.

Citing *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976), the City alludes to its citizens' right to vote and legislate by referendum. However, no one has been denied the right to vote; the net result of the referendum process is legislation, judged by the same constitutional standards as an act of the legislature. The City acknowledges this. (Certiorari Petition at page 19); *see Eastlake, supra,* 426 U.S. at 676 ("If the substantive result of the referendum is arbitrary and capricious, *bearing no relation to the police power,* then the fact that the voters of Eastlake wish it so would not save the restriction.").

Finally, Boca Raton's contention that the Florida Courts applied a "compelling need" standard and failed to apply the "fairly debatable" rule, contrary to previous Supreme Court decisions, is plainly refuted by the operative language in the appeals court's *Boca Villas* opinion:

> As we mentioned above the trial judge found the charter amendment (the Cap) and the implementing zoning ordinances did not bear a rational relationship to a valid municipal purpose and that the ordinances were confiscatory as applied to appellees' property. Our study of the briefs and record convinces us that there is substantial competent evidence to support the finding of an absence of a rational relationship regarding the charter amendment and zoning ordinance.
>
> * * *
>
> "*That is not to say that there must be an absolute necessity requiring the enactment of certain zoning restrictions before they can be tolerated as a proper exercise of the police power.* But, as here, an excessive restriction on the use of private property which does not contribute substantially to the public health, mor-

als, safety and welfare is arbitrary and unreasonable and thus unconstitutional. *Davis v. Sails*, 318 So.2d 214 (Fla. 1st D.C.A. 1975).

* * *

"[I]f it had become appropriate for us to consider the propriety of the trial court's action in the light of the fairly debatable rule,[2] we would affirm the judgment because, as we mentioned earlier, even though there was expert testimony adduced in support of the City's case, that in and of itself does not mean the issue is fairly debatable. If it did, every zoning case would be fairly debatable and the City would prevail simply by submitting an expert who testified favorably to the City's position. Of course that is not the case. The trial judge still must determine the weight and credibility factors to be attributed to the experts. Here the final judgment shows that the judge did not assign much weight or credibility to the City's witnesses." (A.7-8; 12).

The trial court heard 27 days of evidence and concluded the "cap" was irrational. The appellate Court, applying the correct standard as enunciated in *Eastlake* and in scores of Florida decisions, found more than sufficient evidence to support this conclusion. There is no substantial federal right to be vindicated by the Supreme Court's intervention.

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2. The District Court of Appeal held that the entire scheme to limit the City to 40,000 dwelling units was irrational. Since the "implementing" ordinances were enacted for the express purpose of carrying out the "cap," the court found no need to assess their impact upon specific properties under the "fairly debatable" rule.

CONCLUSION

The petition for writ of certiorari should be denied.

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APPENDIX

IN THE DISTRICT COURT OF APPEAL OF THE
STATE OF FLORIDA
FOURTH DISTRICT
CASE NO. 77-533

CITY OF BOCA RATON,
Appellant,

vs.

ARVIDA CORPORATION,
Appellee.

PETITION FOR REHEARING OR IN THE ALTERNATIVE TO CERTIFY CERTAIN QUESTIONS TO THE FLORIDA SUPREME COURT

The decision rendered herein substantially depends upon the decision rendered by this Court on April 18, 1979 in *City of Boca Raton v. Boca Villas Corporation, et al.*, Case No. 76-2322. Therefore this Petition for Rehearing or in the alternative, to certify questions to Florida Supreme Court filed by the City of Boca Raton (hereinafter City) pursuant to Florida Rules of Appellate Procedure 9.330 and 9.030(a)(2)(A)(ii) raises exactly the same issues except where different facts require different statements and questions. The Court overlooked and failed to consider the following:

1. In finding "that the cap lacks *any* rational relationship to a permissible municipal objective" the Court applied the wrong standard of "compelling need" or "substantial need" or "compelling reason" for the exercise of the CITY's police power (p. 5, 3).[1] The Court misappre-

1. References are to pages of the Boca Villas opinion.

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hended the meaning of "necessity" as it relates to the zoning power of a city. See, e.g., *City of St. Petersburg v. Vinoy Park Hotel Co.*, 352 So.2d 149 (Fla. 2d DCA) for discussion of the meaning of the word "need" as it relates to legislative acts of a City.

2. If this Court requires the City to prove "compelling need", a substantial "need", or any necessity therefor before it can exercise its police power of zoning, this Court has erroneously shifted the burden of proof to the City. It is well established Florida law that the "heavy" or "extraordinary" burden of proof is on the plaintiffs - not the City. E.g. *City of Miami v. Silver*, 67 So.2d 646, 647 (Fla. 1953).

If the test of the rationality of the cap is "real necessity" or "compelling need" as opposed to community choice, there would be no basis for any city, no matter how sophisticated its land planning, to uphold a low density plan where natural resources exist to physically support higher density. It would then follow that a community that has sufficient land and water must accept whatever density and rate of growth is to be imposed upon a city by developers. Viewed in this light, the issue is surely not only one of great public interest but of adverse public interest contrary to the established law of Florida.

3. *Burritt v. Harris*, 172 So.2d 820 (Fla. 1965), relied on at page 5, has been expressly receded from in *City of St. Petersburg v. Aiken*, 217 So.2d 315 (Fla. 1968) especially as to upon whom the burden of proof rests.

4. Arvida's complaint[2] carefully avoided the issue of confiscation and alleged generally 1) that the City lacked

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2. The opinion herein is directed only to Count I (R 1-10). Count II (estoppel) was decided adversely to Arvida in *Arvida v. City of Boca Raton* by this Court in Case No. 76-2141.

power to enact the cap (R 10) and 2) irreparable injury because the number of dwelling units that could be built on its recently annexed land had been substantially reduced by the cap 3) *no* reference was made to arbitrariness or irrationality (R 1-10).

This Court held that the dwelling units in the single family categories were conformed to the average of what had been constructed prior to the charter amendment (Opinion herein, page 1). It cannot be denied that this purpose bears a most rational relationship to the stated permissible municipal objectives of preservation of integrity of neighborhoods, control of density, planning for future growth, and re-establishment of a balanced community.

In view of those incontrovertible facts, this Court's refusal to apply the confiscation or fairly debatable criteria in determining the validity of the cap and its implementing ordinances as specifically applied to Arvida's property is obvious judicial error under the established Florida law, since Arvida did not meet its burden of proof.

5. The cause herein was not a class action; - therefore, it was error for the trial judge to invalidate many ordinances not brought before him since they were inapplicable to the property over which he had jurisdiction and plaintiff had no standing to attack them. It is undenied and undeniable that included in the trial court's sweeping destruction of the CITY's entire residential zoning were many ordinances that were not cap-related but were remedial or "corrective".[3]

For example, Arvida's complaint attacked only five post cap ordinances, 1821, 1822, 1828, 1951 and 1952 (R 52-

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3. See Arvida's Complaint (p. 8).

71).[4] Ordinance 1828 is entirely different from the others relating only to interim and permanent densities. Ordinance 1828 contains an extensive revision of the single family zoning district regulations "for the purpose of implementing the Comprehensive Plan of the City of Boca Raton" and establishes single family and multi-family residential districts, business and commercial districts, industrial districts and miscellaneous districts (R 59-68). The interim densities were superseded by subsequent Ordinances 1951 and 1952. Arvida did not attack nor did the trial court consider those portions of Ordinance 1828 that were not cap-related and were inapplicable to Arvida. Instead the Court struck down *all* ordinances between 1828 and 1952 although Arvida did not bring those ordinances before the Court, and had no standing to do so since many provisions thereof were inapplicable to Arvida's property.

Contrary to this Court's opinion (p. 8), it was essential to specifically pass upon the propriety of the trial court's finding that the invalidated single family ordinances were confiscatory or not fairly debatable as applied to Arvida's property.

6. The trial court's order was directly contrary to the undeniable evidence that the Flood Control District determined the City's present water supply is dependent on its water budget (p. 4) [DX 2; R XIV, p 61-64, 71, 85, 94-96]. The City's water budget, and all the unrefuted evidence pertaining thereto, alone justifies a 40,000 cap at this time. Neither this Court nor the trial court can disregard that unrefuted evidence in evaluating the reasonableness of the imposition of the cap or if the cap is invalid, the reasonableness of the subsequent ordinances as they affected the land to which said ordinances are applicable.

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4. Ordinance 1821, 1822 were interim measures that have expired or been superseded by 1951 and 1952.

Florida East Coast Railway v. Michini, 139 So.2d 452, 458 (Fla. 2d DCA).

7. The trial court's broad sweeping destruction of the City's entire residential zoning where most of the invalidated ordinances were not before him violates the rule of judicial restraint and creates chaos within the City. But more significantly, this Court's ambiguous affirmance thereof without utilizing the well established criteria of fairly debatable or confiscation compounds that mischievous ambiguity and creates conflict in the zoning law of Florida. Therefore, since this was not a class action the cause should be remanded with instructions to the trial court 1) to reconsider the broad sweeping effect of his order on *all* single family residential ordinances 2) and to receive further evidence or otherwise evaluate or determine which specific ordinances are affected and to what extent. *Cf. Euclid v. Ambler*, 272 U.S. 365 (1926).

8. In reliance on *State v. DuBose*, 99 Fla. 812, 128 So. 4 (1930) to justify its refusal to use the test of confiscation to evaluate the propriety of the judgment below, this Court confused the questions before it. *DuBose* dealt with application of an unreasonable *use* classification—denial of a permit to build a jail in a neighborhood that did not prohibit that use. The question here is entirely different since it concerns the right of a city to enact zoning legislation that bears a rational relationship to municipal objectives that have been adjudicated constitutionally permissible such as community's choice for lower density. The reestablishment of a balanced community, the planning for future growth and development, preservation of its quality of life, protection of its known water supply. See *Watson, supra, Village of Belle Terre v. Boraas*, 416 U.S. 1536, *City of Eastlake v. Forest City Enterprises*, 96 S.Ct. 2358, *Town*

of Largo v. Imperial Homes, 307 So.2d 571 at 574, *Trachsel, supra.*

9. The public policy of Florida emphasizes the role of the community's choice, empowers each City to determine its own destiny and density, to preserve its quality of life as set forth in the constitution and statutes of Florida, to wit: Article VIII, Section 2(b) of the 1968 Florida Constitution, Florida Statutes Chapter 166 (Municipal Home Rule Powers Act), Chapter 380 (Florida Environmental Land and Water Management Act), Sections 163.3157 et seq. (Local Comprehensive Planning Act).

In the alternative, the City requests that this Court certify to the Florida Supreme Court the following questions of great public interest pursuant to Florida Appellate Rule 9.030(a)(2)(A)(ii):

QUESTIONS

The City includes all questions posed in its Petition for Rehearing or in the alternative, to Certify Questions filed simultaneously in *City of Boca Raton v. Boca Villas Corporation*, Case No. 76-2322, as if set forth verbatim and adds:

QUESTION EIGHT

CAN A COURT INVALIDATE A CITY'S ENTIRE SINGLE FAMILY RESIDENTIAL ZONING PLAN ON THE BASIS THAT IT IS ARBITRARY WHERE IT IS UNDENIED:

1. THAT THE ZONING IN SAID CATEGORIES CONFORMS TO THE AVERAGE OF WHAT HAD BEEN CONSTRUCTED IN THE CITY PRIOR TO THE CAP, AND

2. PLAINTIFF DID NOT ALLEGE NOR PROVE CONFISCATION.

QUESTION NINE

CAN A COURT INVALIDATE A CITY'S ENTIRE SINGLE FAMILY RESIDENTIAL ZONING PLAN ON THE BASIS THAT IT IS ARBITRARY WHERE IT IS UNDENIED:

1. THAT THE ZONING IN SAID CATEGORIES CONFORMS TO THE AVERAGE OF WHAT HAD BEEN CONSTRUCTED IN THE CITY PRIOR TO THE CAP, AND

2. PLAINTIFF DID NOT ALLEGE NOR PROVE THAT THE VALIDITY OF SAID ORDINANCES WAS NOT FAIRLY DEBATABLE AS APPLIED TO ITS PROPERTY.

Respectfully submitted,

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By: /s/ Gerald F. Richman
Gerald F. Richman

By: /s/ Bertha Claire Lee
Bertha Claire Lee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 3rd day of May, 1979 to: Mershon Sawyer Johnston Dunwody & Cole, 1600 First National Bank Bldg., Miami, Florida 33131; Thomas E. Hookano, Pacific Legal Foundation, 455 Capital Mall—Suite 465, Sacramento, California 95814 and William L. Earl, Peeples, Earl & Blank, P.A., One Biscayne Tower, Suite 3636, Miami, Florida 33131.

By: /s/ Bertha Claire Lee
Bertha Claire Lee

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT
CASE NO. 76-2322

CITY OF BOCA RATON,
Appellant,

vs.

BOCA VILLAS CORPORATION, a Florida corporation, and SAMUEL FLETCHER, Trustee, and KEATING-MEREDITH PROPERTIES, INC.,
Appellees.

PETITION FOR REHEARING OR IN THE ALTERNATIVE TO CERTIFY CERTAIN QUESTIONS TO THE FLORIDA SUPREME COURT

Pursuant to Florida Rules of Appellate Procedure 9.330 and 9.030(a)(2)(A)(ii), the CITY OF BOCA RATON (hereinafter the City) petitions this Court to rehear its decision rendered in this cause or in the alternative to certify certain questions to the Florida Supreme Court. The Court overlooked and failed to consider the following:

1. In finding "that the cap lacks *any* rational relationship to a permissible municipal objective" the Court applied the wrong standard of "compelling need" or "substantial need" or "compelling reason" for the exercise of the CITY's police power (p. 5, 3).[1] The Court misapprehended the meaning of "necessity" as it relates to the zoning power of a city. See, e.g., *City of St. Petersburg v. Vinoy Park Hotel Co.*, 352 So.2d 149 (Fla. 2d DCA) for discussion

1. References are to pages of the opinion herein.

of the meaning of the word "need" as it relates to legislative acts of a City.

2. If this Court requires the City to prove "compelling need", a substantial "need", or any necessity therefor before it can exercise its police power of zoning, this Court has erroneously shifted the burden of proof to the City. It is well established Florida law that the "heavy" or "extraordinary" burden of proof is on the plaintiffs - not the City. E.g. *City of Miami v. Silver,* 67 So.2d 646, 647 (Fla. 1953).

If the test of the rationality of the cap is "real necessity" or "compelling need" as opposed to community choice, there would be no basis for any city, no matter how sophisticated its land planning, to uphold a low density plan where natural resources exist to physically support higher density. It would then follow that a community that has sufficient land and water must accept whatever density and rate of growth is to be imposed upon a city by developers. Viewed in this light, the issue is surely not only one of great public interest but of adverse public interest contrary to the established law of Florida.

3. *Burritt v. Harris,* 172 So.2d 820 (Fla. 1965), relied on at page 5, has been expressly receded from in *City of St. Peterburg v. Aiken,* 217 So.2d 315 (Fla. 1968) especially as to upon whom the burden of proof rests.

4. The cause herein was not a class action; - therefore, it was error for the trial judge to invalidate many ordinances not brought before him since they were inapplicable to the property over which he had jurisdiction and plaintiffs had no standing to attack them. It is undenied and undeniable that included in the trial court's sweeping destruction of the CITY's entire multi-family residential

zoning were many ordinances that were not cap-related but were remedial.[2]

For example, Plaintiff Boca Villas' amended complaint upon which trial was based attacked only the cap and Ordinance 1763 changing the Boca Villas' tract from multi- to single family (R. 623).[3] Boca Villas did not even introduce Ordinance 1763 into evidence. It is incontrovertible that Ordinance 1763 is not cap related since action thereon had begun almost a year before the cap. (DX 25, T 33-5-192, T 33-5-198, T 30-63, 64, T 30-68, 69. Ord. 1973). The trial judge was not empowered to ignore that incontrovertible evidence. *Florida East Coast Railway v. Michini,* 139 So.2d 452, 458 (Fla. 2d DCA).

Contrary to its opinion (p. 8), it was essential for this Court to specifically pass upon the propriety of the trial court's finding that Ordinance 1763 was confiscatory or not "fairly debatable".

5. The trial court's order placing both BOCA VILLAS and KEATING-MEREDITH in the R-3 category, but granting BOCA VILLAS zoning "no more restrictive than 13 du/acre" and KEATING-MEREDITH 18 du/acre was itself unconstitutional (unequal protection) since it treated two owners in the same category differently.

6. The trial court's order was directly contrary to the undeniable evidence that the Flood Control District determined the City's present water supply is dependent on its water budget (p. 4) [R 3793-3832]. The City's water

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2. The same Walter Young, City Zoning and Planning Director, whose testimony this Court cites as basis for its affirmance (p. 3) stated that the Boca Villas property should be single family to conform to the City's plan (T 33-5-198).

3. Counts III and IV of the five count Amended Complaint (R 608-627). Counts I and II were moot by the time of trial since construction on that land had been completed by the time of trial. Count V had been dismissed.

budget, and all the unrefuted evidence pertaining thereto, alone justifies a 40,000 cap at this time. Neither this Court nor the trial court can disregard that unrefuted evidence in evaluating the reasonableness of the imposition of the cap or if the cap is invalid, the reasonableness of the subsequent ordinances as they affected the land to which said ordinances are applicable. *Michini, supra.*

7. The trial court's broad sweeping destruction of the City's entire residential zoning where most of the invalidated ordinances were not before him violates the rule of judicial restraint and creates chaos within the City. But more significantly, this Court's ambiguous affirmance thereof without utilizing the well established criteria of fairly debatable or confiscation compounds that mischievous ambiguity and creates conflict in the zoning law of Florida. Therefore, since this was not a class action the cause should be remanded with instructions to the trial court 1) to reconsider the broad sweeping effect of his orders on *all* multifamily ordinances enacted subsequent to the cap 2) and to receive further evidence or otherwise evaluate or determine which specific ordinances are affected and to what extent. *Cf. Euclid v. Ambler,* 272 U.S. 365 (1926).

8. In reliance on *State v. DuBose,* 99 Fla. 812, 128 So. 4 (1930) to justify its refusal to use the test of confiscation to evaluate the propriety of the judgment below, this Court confused the questions before it. *DuBose* dealt with application of an unreasonable *use* classification—denial of a permit to build a jail in a neighborhood that did not prohibit that use. The question here is entirely different since it concerns the right to a city to enact zoning legislation that bears a rational relationship to municipal objectives that have been adjudicated constitutionally permissible such as the community's choice for lower density, reestablishment of a balanced community, planning for future growth

and development, preservation of its quality of life, protection of its known water supply. See *Watson, supra, Village of Belle Terre v. Boraas,* 416 U.S. 1536, *City of Eastlake v. Forest City Enterprises;* 96 S.Ct. 2358, *Town of Largo v. Imperial Homes,* 307 So.2d 571 at 574, *Trachsel, supra.*

9. The public policy of Florida emphasizes the role of the community's choice, empowers each City to determine its own destiny and density, to preserve its quality of life as set forth in the constitution and statutes of Florida, to wit: Article VIII, Section 2(b) of the 1968 Florida Constitution, Florida Statutes Chapter 166 (Municipal Home Rule Powers Act), Chapter 380 (Florida Environmental Land and Water Management Act), Sections 163.3157 et seq. (Local Comprehensive Planning Act).

In the alternative, the City requests that this Court certify to the Florida Supreme Court the following questions of great public interest pursuant to Florida Appellate Rule 9.030(a)(2)(A)(ii):

QUESTION I

DOES THE CITY HAVE THE BURDEN OF PROVING A "REAL NECESSITY", "COMPELLING NEED", "SUBSTANTIAL NEED" OR "COMPELLING REASON" FOR THE EXERCISE OF ITS POLICE POWER OF ZONING OR REZONING?

QUESTION II

WHETHER "REAL NECESSITY" IS THE TEST OF THE VALIDITY OF ZONING MEASURES ENACTED AS A RESULT OF COMMUNITY CHOICE (CAP AND ITS IMPLEMENTING ORDINANCES) TO LOWER DENSITY, PLAN FOR FUTURE GROWTH, REESTABLISH A WELL BALANCED

COMMUNITY, PRESERVE THE INTEGRITY OF NEIGHBORHOODS, AND PRESERVE AND PROTECT ITS KNOWN WATER SUPPLY AND QUALITY OF LIFE?

QUESTION THREE

DO PLAINTIFFS HAVE STANDING TO ATTACK A CITY'S ENTIRE RESIDENTIAL SCHEME AS IT RELATES TO DENSITY, WHERE 1) NO CLASS ACTION HAS BEEN FILED, 2) MOST OF THE ORDINANCES INVALIDATED WERE NOT BROUGHT BEFORE THE COURT, 3) PLAINTIFFS HAVE NO INTEREST IN THE LANDS TO WHICH MANY OF SAID ORDINANCES ARE APPLICABLE?

QUESTION FOUR

IS A COURT EMPOWERED TO INVALIDATE A CITY'S ENTIRE RESIDENTIAL ZONING SCHEME BASED UPON THE CLAIM OF OWNERS OF TWO PARCELS OF LAND WHERE THE ACTION IS NOT BROUGHT AS A CLASS ACTION, OTHER PROPERTY OWNERS WERE NOT JOINED OR NOTIFIED, AND MOST OF THE ORDINANCES INVALIDATED WERE NOT BEFORE THE COURT?

QUESTION FIVE

WHERE PUBLIC POLICY AS SET FORTH IN FLORIDA'S CONSTITUTION AND STATUTES EMPOWERS A CITY TO DETERMINE ITS OWN DESTINY, MAY A COURT 1) IGNORE THE COMMUNITY'S CHOICE FOR LOW DENSITY AS EXPRESSED BY REFERENDUM, 2) FAIL TO APPLY

THE FAIRLY DEBATABLE RULE, 3) FAIL TO CONSIDER CONFISCATION AS TO ALL PROPERTY TO WHICH THE INVALIDATED ORDINANCES ARE APPLICABLE, 4) AND SHIFT THE BURDEN TO THE CITY TO PROVE "REAL" OR "COMPELLING" NECESSITY FOR THE QUESTIONED LEGISLATION?

QUESTION SIX

MAY A COURT APPLY A TEST OF "REAL NECESSITY" TO DETERMINE WHETHER A ZONING PLAN (THE CAP AND ITS IMPLEMENTING ORDINANCES), IS ARBITRARY OR UNREASONABLE THEREBY SHIFTING THE BURDEN OF PROOF TO THE CITY AND MAKING IT IMPOSSIBLE TO ENACT ZONING THAT ACCOMPLISHES THE CONSTITUTIONALLY PERMISSIBLE MUNICIPAL OBJECTIVES OF CONTROL OF DENSITY, FUTURE PLANNING, PRESERVATION OF INTEGRITY OF NEIGHBORHOODS, PROTECTION OF ITS WATER SUPPLY AND OTHER FACTORS?

or in the alternative,

QUESTION SEVEN

IN DETERMINING THE RATIONALITY OF THE QUESTIONED LEGISLATION WHERE THE MUNICIPAL PURPOSES TO BE SERVED HAVE BEEN ADJUDICATED CONSTITUTIONALLY PERMISSIBLE BY OTHER UNITED STATES SUPREME COURT AND FLORIDA APPELLATE COURT DECISIONS, ARE THE TRADITIONAL TESTS TO BE APPLIED CONFISCATION AND FAIRLY DEBATABLE AS APPLIED TO A PARTICULAR PIECE OF

PROPERTY AND/OR THE ENTIRE RESIDENTIAL PROPERTY OF A CITY

Respectfully submitted,

Frates Floyd Pearson Stewart Richman & Greer, P.A.
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Miami, Florida 33131
Telephone: (305) 377-0241

By: /s/ Gerald F. Richman
Gerald F. Richman

By: /s/ Bertha Claire Lee
Bertha Claire Lee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 3rd day of May, 1979 to: Mershon Sawyer Johnston Dunwody & Cole, 1600 First National Bank Bldg., Miami, Florida 33131; Thomas E. Hookano, Pacific Legal Foundation, 455 Capital Mall—Suite 465, Sacramento, California 95814 and William L. Earl, Peeples, Earl & Blank, P.A., One Biscayne Tower, Suite 3636, Miami, Florida 33131.

By: /s/ Bertha Claire Lee
Bertha Claire Lee

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT
CASE NO. 77-533.

CITY OF BOCA RATON,
Appellant,

v.

ARVIDA CORPORATION,
Appellee.

May 25, 1979

BY ORDER OF THE COURT:

ORDERED that the May 3, 1979 Petition for Rehearing, or, in the alternative, to Certify Certain Questions to the Florida Supreme Court, is hereby denied.

I hereby certify the foregoing is a true copy of the original court order.

/s/ Clyde L. Heath
Clyde L. Heath,
Clerk

cc: Bertha Claire Lee, Esq.
Mershon Sawyer Johnston Dunwody & Cole
Thomas E. Hookano, Pacific Legal Foundation
Peeples, Earl & Blank, P.A.

cms

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT
CASE NO. 76-2322

CITY OF BOCA RATON,
Appellant,

v.

BOCA VILLAS CORPORATION, etc., et al.,
Appellee.

May 25, 1979

BY ORDER OF THE COURT:

ORDERED that the Appellant's May 3, 1979 Petition for Rehearing, or in the alternative to certify certain questions to the Florida Supreme Court, is hereby denied.

I hereby certify the foregoing is a true copy of the original court order.

/s/ Clyde L. Heath
Clyde L. Heath,
Clerk

cc: Gerald F. Richman, Esq.
Mershon Sawyer Johnston Dunwody & Cole
Thomas E. Hookano, Pacific Legal Foundation
William L. Earl, Esq.

cms

IN THE SUPREME COURT OF FLORIDA

CASE NO. 57154

CITY OF BOCA RATON,
Appellant,

vs.

BOCA VILLAS CORPORATION, a Florida corporation, and SAMUEL FLETCHER, Trustee, and KEATING-MEREDITH PROPERTIES, INC.,
Appellees.

CASE NO. 57155

CITY OF BOCA RATON,
Appellant,

vs.

ARVIDA CORPORATION,
Appellee.

BRIEF ON JURISDICTION

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Bertha Claire Lee
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The CITY OF BOCA RATON (CITY) invokes this Court's jurisdiction to review two decisions of the Fourth District Court of Appeal affirming the trial court's sweeping invalidation of the CITY's entire residential zoning plan on the basis that the CITY's 40,000 dwelling unit "cap" is arbitrary and unreasonable (A 1-10). The decisions below announce "*rule(s) of law* which conflict with rule(s) previously announced by this Court" and all Florida district courts of appeal. *Nielsen v. City of Sarasota*, 117 So.2d 731 (Fla.1960) (emphasis by the Court) and its recent progeny.

Unless this Court resolves these real and embarrassing conflicts, the unprecedented decisions *sub judice* produce confusion, ambiguity and chaos in the law of zoning and adversely affect every city in Florida.